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Samuel John Marisinapen v Public Prosecutor

B HIGH COURT (PULAU PINANG) — CRIMINAL APPEAL NO 41S-3–03 OF 2016
AHMAD SHAHRIR JC
19 FEBRUARY 2018

C *Criminal Procedure — Appeal — Appeal against conviction and sentence — Accused charge for offence of using criminal force with intention of outraging modesty — Victim minor and underaged — Accused sentenced to six months imprisonment — Whether testimony of witnesses credible and could be accepted — Whether coherent and supported one another — Whether conviction and*
D *sentence ought to be set aside — Penal Code s 354*

At the magistrate's court, the appellant/the accused was charged with and convicted under s 354 of the Penal Code, for the offence of using criminal force
E with the intention of outraging modesty. On 13 February 2013, PW3 and two of her friends took the elevator to level 8. When the elevator doors opened, PW3 and her two friends saw PW4 and the accused near the staircase at level 8. PW3 went down and told her mother what she and her friends saw at level 8. PW3's mother then told PW3 to inform PW4 mother about it. PW3 told
F PW4's mother that she saw PW4 with an unidentified man (the accused) at level 8. PW2 in turn informed PW4's father, PW1. PW1 went to level 8 and as soon as the elevator doors opened, PW1, PW2 and PW3 saw the accused was holding and kissing PW4. PW1 screamed at the accused and pulled the accused's hands away from his daughter, PW4. The accused was later
G apprehended by a few residents and then handed over to the police. PW1 lodged a police report on the same day. The victim, PW4 was aged 12 years and six months at the time of the incident and when the case went for trial, PW4 was 13. Satisfied that the prosecution succeeded in establishing a prima facie case, the magistrate called the accused to enter his defence. In his defence, the
H accused denied forcing the kiss on PW4. The trial judge convicted the appellant for the offence and sentence him to six months of imprisonment. The appellant appealed against the conviction and sentence.

Held, allowing the appeal acquitting and discharging the accused:

I (1) Despite the contradiction between the oral testimony of PW1 and his police report, the magistrate accepted PW1's evidence although the magistrate acknowledged that PW1 was an interested witness. PW1 stated in his police report that the accused had immediately let go of PW4 upon seeing PW1 but, in his evidence-in-chief, PW1 said that he had to

pull the accused's hand to free PW4 from the accused and that he saw the accused had pulled PW4 towards him and kissed her while PW4 was pushing the accused with her hands, with her feet at a distance from the accused, suggesting that PW4 was trying to free herself from the accused (see para 41).

(2) PW4 made telephone calls and sent the text messages after the incident. This was relevant under s 8 of the Evidence Act 1950 to show whether the accused had kissed PW4 with her consent or not. If PW4 had in fact not consented to the kissing by the accused, she would not have made the telephone calls and sent the text messages numerous times in an apologetic manner (see paras 38 & 40).

(3) The video recording of the oral evidence of the child witness must be made with a view to its admission as evidence of examination-in-chief of the child witness, in order to be admissible under s 3(1)(c) of the Act. If the video recording was not made with a view to its admission, it was not a 'video recording' envisaged under s 2 to be admissible under s 3 of the Act. In the absence of exhs P6 and P6A, the prosecution was left with the oral evidence of PW4, PW1 and PW2. The magistrate relied on the evidence of PW4's parents but did not elaborate or explain the nature and extent of the caution she took when she cautioned herself when accepting the evidence of PW1 and PW2. Neither did the magistrate elaborate what made her accept the evidence of PW1 especially, and PW2 as credible despite them being interested witnesses (see paras 51 & 55).

[Bahasa Malaysia summary

Di mahkamah majistret, perayu/tertuduh didakwa dan disabitkan di bawah s 354 Kanun Keseksaan, atas kesalahan menggunakan kekerasan jenayah dengan niat mencabul kehormatan. Pada 13 Februari 2013, PW3 dan dua temannya menaiki lif ke tingkat 8. Apabila pintu lif dibuka, PW3 dan dua rakannya melihat PW4 dan tertuduh berhampiran tangga di tingkat 8. PW3 turun dan memberitahu ibunya apa dia dan kawan-kawannya nampak di tingkat 8. Ibu PW3 kemudian memberitahu PW3 untuk memberitahu ibu PW4 tentang hal ini. PW3 memberitahu ibu PW4 bahawa dia melihat PW4 dengan seorang lelaki yang tidak dikenali (tertuduh) di tingkat 8. PW2 pula memberitahu bapa PW4 iaitu PW1. PW1 pergi ke tingkat 8 dan sebaik sahaja pintu lif dibuka, PW1, PW2 dan PW3 melihat tertuduh memegang dan mencium PW4. PW1 menjerit pada tertuduh dan menarik tangan tertuduh dari anak perempuannya, PW4. Tertuduh kemudiannya ditangkap oleh beberapa penduduk dan kemudian diserahkan kepada pihak polis. PW1 membuat laporan polis pada hari yang sama. Mangsa, PW4 berusia 12 tahun dan 6 bulan pada masa kejadian dan semasa kes dibicarakan, PW4 berumur 13 tahun. Berpuas hati bahawa pihak pendakwaan berjaya mewujudkan kes prima facie, majistret memanggil tertuduh membela diri. Dalam pembelaannya, tertuduh menafikan mencium PW4 secara paksa. Hakim bicara mensabitkan

perayu atas kesalahan dan menjatuhkan hukuman penjaran enam bulan penjara terhadapnya. Perayu merayu terhadap sabitan dan hukuman dalam rayuan ini.

Diputuskan, membenarkan rayuan membebaskan dan melepaskan tertuduh:

(1) Walaupun terdapat percanggahan antara keterangan lisan PW1 dan laporan polisnya, majistret menerima keterangan PW1 walaupun Majistret mengakui bahawa PW1 adalah saksi berkepentingan. PW1 menyatakan dalam laporan polis bahawa tertuduh segera melepaskan PW4 setelah melihat PW1 tetapi, dalam keterangan utamanya, PW1 mengatakan bahawa dia terpaksa menarik tangan tertuduh untuk membebaskan PW4 daripada tertuduh dan bahawa dia melihat tertuduh menarik PW4 ke arahnya dan menciumnya sementara PW4 menolak tertuduh dengan tangannya, dengan kakinya jauh dari tertuduh, mencadangkan bahawa PW4 cuba membebaskan dirinya daripada tertuduh. (lihat perenggan 41).

(2) PW4 membuat panggilan telefon dan menghantar mesej teks selepas kejadian tersebut. Ini adalah relevan di bawah s 8 Akta Keterangan 1950 untuk menunjukkan sama ada tertuduh mencium PW4 dengan persetujuannya atau tidak. Jika PW4 sebenarnya tidak bersetuju dengan ciuman tertuduh, dia tidak akan membuat panggilan telefon dan menghantar mesej teks berkali-kali dengan cara memohon maaf (lihat perenggan 38 & 40).

(3) Rakaman video keterangan lisan saksi kanak-kanak hendaklah dibuat dengan tujuan kemasukannya sebagai keterangan pemeriksaan utama saksi kanak-kanak, agar boleh diterima di bawah s 3(1)(c) Akta. Jika rakaman video tidak dibuat dengan tujuan kemasukannya, ia bukanlah 'rakaman video' yang dibayangkan di bawah s 2 untuk diterima di bawah s 3 Akta. Tanpa eksh P6 dan P6A, pihak pendakwaan hanya mempunyai keterangan lisan PW4, PW1 dan PW2. Majistret bergantung pada keterangan ibu bapa PW4 tetapi tidak menjelaskan atau menjelaskan sifat dan sejauh mana langkah yang diambilnya ketika dia memberi amaran ketika menerima keterangan PW1 dan PW2. Majistret juga tidak menjelaskan apa yang membuatnya menerima keterangan PW1 terutamanya, dan PW2 yang boleh dipercayai walaupun mereka saksi berkepentingan (lihat perenggan 51 & 55).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 321–500.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85; [2004] 2 MLRA 547, FC (refd)
Balasingham v PP [1959] 1 MLJ 193; [1959] 1 LNS 8; [1959] 1 MLRH 585 (refd)
Dato' Seri Anwar bin Ibrahim v PP and another appeal [2015] 2 MLJ 293; [2015] 2 CLJ 145, FC (refd)
Harvinder Singh a/l Joginder Singh v PP and another appeal [2018] MLJU 51; [2018] 1 LNS 29; [2018] MLRAU 20, CA (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003] 1 CLJ 734; [2002] 2 MLRA 383, CA (refd)
Malti v PP [2017] MLJU 1790; [2017] 1 LNS 1705; [2017] MLRAU 464, CA (refd)
Mary Colete John v South East Asia Insurance Bhd [2010] 6 MLJ 733; [2010] 8 CLJ 129; [2012] 6 MLRA 89, FC (refd)
Mohd Yusri bin Mangsor & Anor v PP and another appeal [2014] 4 MLJ 875; [2014] 7 CLJ 897; [2014] MLRAU 284, CA (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19; [2009] 1 CLJ 717; [2008] MLRA 763, FC (refd)
PP v Chu Beow Hin [1982] 1 MLJ 135; [1982] CLJ 110; [1982] CLJ Rep 288; [1981] 1 MLRA 181, FC (refd)
Tan Kim Hock Product Centre Sdn Bhd & Anor v Tan Kim Hock Tong Seng Food Industry Sdn Bhd [2018] 2 MLJ 1; [2018] 2 CLJ 567; [2017] MLRAU 522, FC (refd)

Legislation referred to

Control of Supplies Act 1961 s 14(2)(b)
Evidence Act 1950 ss 8, 133A
Evidence of Child Witness Act 2007 ss 2, 3, 6, 3(1)(a), (1)(c)
Penal Code ss 354, 350, 354

Simon Murali (Kok Yuen Lin with him) (Simon Murali & Co) for the appellant.
JG Kameeni Jaya Raman (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Ahmad Shahrir JC:

INTRODUCTION

[1] At the magistrate's court, the appellant was charged with and convicted of an offence under s 354 of the Penal Code. Upon conviction, the appellant was sentenced to six months of imprisonment from the date of his arrest. The appellant appeals against both the conviction and sentence.

[2] After evaluating the record of appeal and considering the submissions of

learned counsel for the defence and the learned deputy public prosecutor, I allow the appeal, quash the conviction and set aside the sentence. The accused was acquitted and discharged.

[3] The prosecution is not satisfied with my decision and filed an appeal. These are the grounds for my decision. The prosecution and the accused are referred to as they were at the trial court.

BRIEF FACTS

[4] The charge proffered against the accused reads as follows:

> Bahawa kamu pada 13/02/2013, jam lebih kurang 1830hrs di hadapan lift, tingkat 8, Pangsapuri Harmoni, Jalan Kennedy, Georgetown, Pulau Pinang, di dalam Daerah Timur Laut, di dalam Negeri Pulau Pinang, telah menggunakan kekerasan jenayah kepada NAMH (No. MyKid: XXX) dengan niat untuk mencabul kehormatannya. Oleh itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 354 Kanun Keseksaan.

[5] On 13 February 2013 between 4pm to 6pm at Pangsapuri Harmoni, Jalan Kennedy, Georgetown, Penang, PW3 and two of her friends, Wan Norliana and Zulhelmi, took the elevator to level 8. When the elevator doors opened, PW3 and her two friends saw PW4 and the accused near the staircase at level 8. Zulhelmi got off at level 8 while PW3 and Wan Norliana took the elevator again and went down to PW3's house. When PW3 reached her house, she told her mother what she and her friend, Wan Norliana, had seen at level 8. PW3's mother then told PW3 to inform PW4 mother about it.

[6] PW3 and Wan Norliana went to PW4's house at level 4 and told PW4's mother ('PW2'). PW3 told PW2 that he saw PW4 with an unidentified man (the accused) at level 8. PW2 in turn informed PW4's father, PW1. Later, PW1, PW2, PW3 and Wan Norliana took the elevator and went to level 8. When they reached level 8 and as soon as the elevator doors opened, PW1, PW2, PW3 saw the accused was holding and kissing PW4. PW1 screamed at the accused and pulled the accused's hands away from his daughter, PW4. The accused was later apprehended by a few residents and then handed over to the police. PW1 lodged a police report on the same day at about 7.50pm.

[7] The victim, PW4 was aged 12 years and six months at the time of the incident and when the case went for trial, PW4 was 13. PW4 said in her evidence that on 13 February 2013 at about 6.30pm in front of the elevator at level 8 the accused had held and kissed her without her consent.

THE PROSECUTION'S EVIDENCE

[8] According to the victim's father, PW1, PW3 and Wan Norliana came to his house at about 6.30pm and told him something happened to his daughter, PW4. Both PW3 and Wan Norliana did not tell him what had happened but asked PW1 to follow them and look for himself. PW1 and his wife, PW2 then followed PW3 and Wan Norliana to level 8. They used the elevator. PW1 said when the elevator doors opened, he was shocked to see a man was holding his daughter. The man was later identified in court as the accused. Both the accused and his daughter were standing.

[9] According to PW1, he saw the accused was pulling his daughters head close to him and the accused was kissing his daughter. At the same time, he saw his daughter was pushing the accused to set herself free from the accused's clasp. PW1 said he saw the accused's head was upright while his daughter appeared in a leaning position struggling in an attempt to free herself from the accused. PW1 also said he saw his daughter's legs were also pulled away from the accused. At that time, he yelled at the accused but the accused did not let go of her daughter even after PW1 had got out of the elevator.

[10] PW1 then pulled the accused's hand away from his daughter. PW1 pulled away the accused's right hand. The moment his daughter was released, PW1 said he saw his daughter ran away but he was not sure whether his daughter took the elevator or the stairs. PW1 kept on holding to the accused because he did not want the accused to get away. The accused was later arrested with the help of residents and handed over to the police. PW1's wife, PW2 gave the same evidence as PW1. PW1 lodged a police report vide Kampong Baru Report No 246/13 which was tendered as exh P1. In his police report, PW1 states that when the elevator doors opened, he saw the accused was kissing his daughter. PW1 states in his police report that when the accused saw him, his wife, PW3 and Wan Norliana, the accused immediately let go of his daughter. In cross-examination, PW1 agreed that the statement which he gave to the investigating officer is the same as his police report.

[11] PW3 had earlier saw PW4 together with the man at level 2. PW3 identified the man he saw earlier at level 2 together with PW4 as the accused. According to PW3, at that time when she saw PW4 and the accused was facing each other having a conversation. PW3 said that PW4 appeared startled when she saw PW3. On the day of the incident, PW3 said initially saw PW4 downstairs at the car porch. At that time PW3 was together with Wan Norliana. PW3 said she asked PW4 who was the man PW4 had met a few days before the incident. PW3 said PW4 told her that she got to know the man from Facebook. According to PW3, when she asked PW4 how did the accused

managed to get her address, PW4 told her that she made a mistake in giving the accused her address.

[12] PW3 said after that PW4 appeared nervous and restless and then went upstairs. About ten minutes later, PW3 said she saw the accused came with a motorcycle and went up too using the stairs. PW3 and Wan Norliana were curious of PW4 and the accused and decided to check out on them. They first took the elevator and went up to level 2 but they did not see PW4 and the accused there. PW3 and Wan Norliana then looked down to the car porch from level 2 and the accused's motorcycle was still there. After that, they went up and checked each floor using the elevator until level 5 but did not see PW4 and the accused. Both PW3 and Wan Norliana then decided to call their friend, Zulhelmi to accompany them to check on PW4 and the accused at level 8. When asked why specifically level 8, PW3 said normally level 8 would be quiet and not many people would go up there. When PW3, Wan Norliana and Zulhelmi reached level 8, they saw the accused and PW4 were sitting at the staircase. According to PW3, PW4 and the accused looked startled upon seeing them. Zulhelmi then got out of the elevator while PW3 and Wan Norliana went down to PW3's house at level 3. PW3 related to his mother what she had just saw and then PW3's mother told PW3 and Wan Norliana to inform PW4's mother about what they had just seen.

[13] PW3 and Wan Norliana went to PW4's house and informed PW4's parents. Then PW3, Wan Norliana, PW1 and PW2 went up the elevator again to level 8 and when the elevator door opened, PW3 said she saw the accused was holding PW4's hands and was about to kiss PW4. PW3 said she saw PW4 pushing the accused and then PW1 yelled 'kurang ajar' and went straight to the accused and hit the accused.

[14] PW4's evidence was purportedly admitted by the learned magistrate as evidence of a 'video recording' pursuant to s 3(1)(c) of the Evidence of Child Witness Act 2007 despite objections by the defence. The video recording of PW4 was taken by Insp Faizah bt Mohamad Lajis ('PW5') who interviewed PW4 about the incident on 20 February 2013 at about 11.46am. The interview was video recorded at the Child Interview Centre, Jalan Tunku Kudin, Georgetown, Penang. At the trial, which commenced on 14 November 2013, the prosecution produced the video recording as evidence-in-chief for PW4 pursuant to s 6 of the Evidence of Child Witness Act 2007. The video recording was produced as exh P6 and its transcript was produced as exh P6A.

[15] PW4 was further examined during trial. Before PW4's evidence was taken, the learned magistrate conducted an inquiry under s 133A of the Evidence Act 1950 to determine if she understands the nature of an oath. The learned magistrate, upon being satisfied that PW4 did not understand the

nature of an oath, proceeded with an inquiry to determine if PW4 is possessed of sufficient intelligence and understands the duty of speaking the truth before receiving PW4's evidence. The learned magistrate found that PW4 satisfied the conditions under s 133A of the Evidence Act 1950 and thus received PW4's evidence although it was not given under oath.

[16] According to PW4, she knew the accused through her mother's Facebook account. PW4 had been using her mother's Facebook and got to know the accused. PW4 and the accused exchanged telephone numbers and PW4 gave the accused her house address. PW4 said she had arranged to meet the accused on 12 February 2013 at Pangsapuri Harmoni. On that day, they just talked. PW4 also said that on that day while she was talking to the accused, she saw her friend who lived at level 2 (PW3). The accused went off at about 6pm on that day.

[17] On the day in question, PW4 said the accused called her and wanted to meet her. PW4 said at that time she was at the library at the ground floor of the flat. PW4 said she did not say anything. When she got out of the library, PW4 said she saw the accused's motorcycle. PW4 then went up using the stairs. The accused saw her taking the stairs and went up the stairs together. The accused then took PW4 to level 8. According to PW4, at that time she felt like she wanted to yell and cry but she could not. When they were at level 8, they talked. Later the accused said he wanted to go back and then pulled PW4's hands and kissed her hands. The accused later pulled her neck and PW4 tried to push the accused away but she could not. It was then that her father PW1 came up the elevator, yelled at the accused and the accused let go of her hands.

[18] According to PW4, she did not allow the accused to touch her but at that time, she was unable to scream because the accused's mouth was too close to her mouth. The accused then kissed her on her mouth and held her. The accused held her at the back of her body and on her shoulders. Before her father came up, PW4 said she tried to resist and push the accused but did not manage to do so because the accused had held her tight. When her father came up and yelled at the accused, PW4 said she ran away because she was afraid.

[19] In cross-examination, PW4 said that in her Facebook communication with the accused, PW4 said that she loved the accused and that when suggested by the learned defence counsel, PW4 agreed that she wanted the accused to be her friend. PW4 also said that before the incident, the accused called and messaged her through SMS many times. The accused agreed that she gave her telephone number to the accused as well as her house address. In the first incident where PW4 met the accused, PW4 said that she did not tell her parents about it.

[20] PW4 said during the second visit which led to the accused being arrested, PW4 had a chat with the accused although PW4 said that she had told the accused against coming to her flat. PW4 also agreed that she also had wanted to meet and have a chat with the accused and she did not run into her house upon seeing the accused. PW4 agreed that when the accused pulled her hand into the elevator to go up to level 8, she could scream for help if indeed she was taken by the accused into the elevator to go to level 8 against her will. PW4 disagreed when suggested by the learned defence counsel that she was willing when the accused kissed her. But PW4 agreed to the suggestion by the learned defence counsel she only felt afraid when she saw her parents came out of the elevator doors.

[21] About a week after the incident, PW4 said that she sent the accused an SMS saying that she was sorry about what had happened. PW4 even called the accused later in the evening but the accused did not answer her call. PW4 made several calls the following day and the days after. In one of the SMS (exh D7) PW4 sent to the accused, PW4 had apologised to the accused over what had happened.

[22] The learned magistrate ruled that the prosecution has succeeded in establishing a prima facie case against the accused and called upon the accused to enter his defence. In his own defence, the accused gave evidence under oath.

THE DEFENCE

[23] The accused admitted that he had a Facebook account and used the name 'Roy Roy' as his pseudonym. He got to know PW4 through Facebook. According to the accused, he received a friend suggestion from one Saljiah Hj Yusof (PW4's mother — PW2) through Facebook. The accused said he started to chat with 'Saljiah Hj Yusof' and later, the person who was using the 'Saljiah Hj Yusof' Facebook account admitted to him that the Facebook account belonged to her mother and that she was just using it. During the Facebook chat, the accused said that did not know the real name of the person who was using the 'Saljiah Hj Yusof' Facebook account but later through a telephone conversation, the accused got to know that she was actually chatting with PW4.

[24] The accused maintained the entries of his Facebook chat with PW4 in his laptop and it was tendered as exhs D2A–D2H. According to the accused, during the Facebook chat, PW4 told him on 11 January 2013 that she loved him. On 26 January 2013, PW4 told the accused that she was willing to be the accused's friend and on 27 January 2013, PW4 gave the accused her telephone number. PW4 told him that she was 23 years old to which the accused believed. According to the accused, the Facebook chat led from one topic to another and

in the end, PW4 told the accused that she misses him. The accused reciprocated and told PW4 that he misses her too.

[25] The accused said that one day, the accused told PW4 that he wanted to meet her. On the appointed date, the accused went to PW4's house at Pangsapuri Harmoni on his motorcycle. The accused met PW4 at level 1 near the staircase. They met for about one hour and just talked. That was the first meet-up. On the second occasion, the accused went again to Pangsapuri Harmoni to meet PW4. That was about two weeks before he was arrested. This time, it was PW4 who asked to meet up with the accused. The second meet up lasted for about 30 minutes. They met at the same place, near the staircase. During this meet-up, both of them began some romantic chat. On the third occasion, PW4 made a telephone call to the accused and invited the accused to meet up again. They met at the same place, near the staircase.

[26] A day before the incident, PW4 called the accused to wish him a happy birthday. They had wanted to meet up on that day but cancelled later because it was raining and the accused has to go to work. They agreed to meet up the next day, on 13 February 2013. On 13 February 2013 when the accused reached Pangsapuri Harmoni, he parked his motorcycle and went up to level 1 to meet PW4 at the staircase. Initially, they had a chat at the staircase at level 1 but they were disturbed by the kids playing there. According to the accused, PW4 then invited the accused to go to level 8 and said to the accused that it would be quieter there. Both of them then took the elevator to level 8 and then sat at the staircase which is directly opposite the elevator. They chat as usual.

[27] At about 6.15pm, the accused told PW4 that he is already late for work and had to make a move. At that time, PW4 went in front of the accused and prevented the accused from leaving. PW4 held the accused and did not want the accused to leave and wanted the accused to spend more time with her. Before he knew it, they were kissing. The accused denied forcing the kiss on PW4. The accused said he loved PW4 and that he felt PW4 loved him too. When they were kissing, both of them held each other's waist.

[28] Suddenly, the accused heard the elevator door opened. The accused immediately let go of PW4 and PW4 ran down the stairs. The accused said he saw two adults and a woman came out of the elevator and there were two teenagers still in the elevator. The accused heard one of the adults (PW1) screamed at him saying he is PW4's father. PW1 then hit him and the accused was later apprehended and taken to the police station. The accused later lodged a police report about the incident where he was beaten up. The police report lodged by the accused was tendered as exh D13. The accused's cell phone showing call logs for all calls and missed calls made to and received from PW4 was also tendered as exh D16.

A ANALYSIS AND DECISION

[29] The Federal Court in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85; [2004] 2 MLRA 547 (FC) explained the finding of a prima facie case in the following manner:

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> A prima facie case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal. The phrase 'prima facie case' is defined in similar terms in *Mozley and Whiteley's Law Dictionary* (11th Ed) as:
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> > A litigating party is said to have a prima facie case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A prima facie case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.
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> The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand, if a prima facie case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either
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> way the court must, at the close of the case for the prosecution, undertake a positive evaluati on of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established. As the trial is without a jury it is only with such a positive evaluation can the court make a determination for the purpose of s 180(2) and (3). Of course, in a jury trial where the evaluation is hypothetical the question to be asked would be whether on the
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> evidence as it stands the accused could (and not must) lawfully be convicted. That is so because a determination on facts is a matter for ultimate decision by the jury at the end of the trial. Since the court, in ruling that a prima facie case has been made out, must be satisfied that the evidence adduced can be overthrown only by evidence in rebuttal it follows that if it is not rebutted it must prevail. Thus, if the accused
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> elects to remain silent he must be convicted. The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a prima facie case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such
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> doubt there can be no prima facie case.

[30] In determining whether the prosecution has succeeded in establishing a prima facie case, the judge as a trier of facts, must embark on a maximum evaluation of the evidence. In *Looi Kow Chai & Anor v Public Prosecutor* [2003]

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2 MLJ 65; [2003] 1 CLJ 734; [2002] 2 MLRA 383, the Court of Appeal held, inter alia, that:

> Under s 180 of the Criminal Procedure Code (Revised 1999), the duty of a judge, sitting alone, at the close of the case for the prosecution, is to determine, as a trier of fact, whether the prosecution has made out a prima facie case against the accused.

> The judge has only one exercise to undertake; he must subject the evidence of the prosecution to a maximum evaluation and then ask himself this question: If I decide to call upon the accused to enter on his defence, and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution's case? If the answer is in the negative, then no prima facie case has been made out, and the accused is entitled to an acquittal. (Subjecting the prosecution's evidence to a maximum evaluation to determine if the defence is to be called does not mean that the prosecution has to prove its case beyond a reasonable doubt at that intermediate stage).

[31] This court observes that in carrying out a maximum evaluation of the evidence to determine whether a prima facie case has been made out, the credibility of the witness comes within the domain of the trial judge who has had the audio-visual advantage of listening and hearing the testimony of witnesses. In *Malti v Public Prosecutor* [2017] MLJU 1790; [2017] 1 LNS 1705; [2017] MLRAU 464, the Court of Appeal referred to the case of *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2015] 2 MLJ 293; [2015] 2 CLJ 145 (FC) and reiterated that the creditworthiness of a witness is a matter best left to the trial judge for determination and the appellate court should be very slow to interfere with such findings of the trial judge who has the audio-visual advantage of hearing and seeing the demeanour of the witnesses in person.

[32] I am also mindful of the well-established principle that an interested witness is still worthy of credit and entitled to belief unless cogent reasons for disbelief can be advanced in the light of evidence to the contrary and the surrounding circumstances (see *Balasingham v Public Prosecutor* [1959] 1 MLJ 193; [1959] 1 LNS 8; [1959] 1 MLRH 585, *Harvinder Singh a/l Joginder Singh v Public Prosecutor and another appeal* [2018] MLJU 51; [2018] 1 LNS 29; [2018] MLRAU 20 (CA)).

[33] Section 354 of the Penal Code reads as follows:

> 354 Assault or use of criminal force to a person with intent to outrage modesty
>
> Whoever assaults or uses criminal force to any person, intending to outrage or knowing it to be likely that he will thereby outrage the modesty of that person, shall be punished with imprisonment for a term which may extend to ten years or with fine or with whipping or with any two of such punishments.

[34] In proving a charge under s 354 of the Penal Code against the accused, the following ingredients must be proved:

(a) there must have been assault or use of criminal force; and

(b) the assault or criminal force must have been made with the intention to outrage the persons modesty or with the knowledge that the person's modesty was likely to be outraged.

[35] 'Criminal force' is defined under s 350 of the Penal Code as follows:

> 350 Criminal force
>
> Whoever intentionally uses force to any person, without that person's consent, in order to cause the committing of any offence, or intending by the use of such force illegally to cause, or knowing it to be likely that by the use of such force he will illegally cause injury, fear, or annoyance to the person to whom the force is used, is said to use criminal force to that other.

[36] In the present appeal, PW1 had lodged a police report (exh P1) after the incident and in cross-examination, he agreed that the statement which he gave to the police is the same as the contents of his police report. In his police report, PW1 states that the accused had immediately let go of her daughter, PW4, upon seeing PW1. In his evidence-in-chief, PW1 elaborated how he had to pull the accused's hand to free her daughter from the accused and that he saw the accused had pulled PW4 towards him and kissed her while PW4 was pushing the accused with her hands with her feet at a distance from the accused suggesting that PW4 was trying to free herself from the accused. The learned magistrate in her grounds of judgment did not touch on this issue and did not elaborate the reasons why she chose to hold that PW1 is a credible witness despite this contradiction taking into consideration that PW1 has every reason to make sure that the accused, who has kissed his daughter, pays for what he did to his daughter.

[37] I am of the considered view that this fact is material to establish whether or not PW4 consented to the kiss in light of the fact that it was PW4 who had allowed the accused in and went to level 8 together with the accused, made calls and sent text messages to the accused after the incident to apologise to the accused over what had happened. It is material to determine whether the ingredient of criminal force has in fact been established by the prosecution.

[38] The act of PW4 in making the telephone calls and sending the text messages after the incident is, in my considered view, relevant under s 8 of the Evidence Act 1950 to show whether the accused had kissed PW4 with her consent.

[39] Evidence of conduct is relevant under s 8 of the Evidence Act 1950 if it influences or is influenced by any fact in issue or relevant fact, and whether it was a conduct antecedent or subsequent thereto (see *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717; [2008] MLRA 763 (FC)).

Sarkar on Evidence (15th Ed) says at p 175:

> The conduct of party to a proceeding or his agent in reference to such proceeding at the time when the facts occurred out of which the proceeding arises, or in reference to any fact in issue or relevant fact, or the conduct of the complainant, is relevant; but the condition precedent to its admissibility as 'conduct' is that it must directly influence or be influenced by a fact in issue or relevant fact and such conduct does not include action resulting from other causes or circumstances. It must be the essential complement of the act done or refused to be done. Conduct includes antecedent or subsequent conduct involving both actions and statements.

[40] I am of the considered view that the subsequent apologetic conduct of PW4 is relevant to show that the accused had kissed PW4 with the consent of PW4. PW4 had made the telephone calls and sent the text messages many times. Not once or twice. PW4's apologetic conduct is not consistent with the fact that she did not consent to the accused kissing her but was more consistent with the fact that PW4 felt sorry that their activities at level 8 were discovered and the accused were made to face the brunt. If PW4 had in fact not consented to the kissing by the accused, PW4 would not have made the telephone calls and sent the text messages numerous times in an apologetic manner. That is not consistent with the fact that PW4 did not consent to the kissing.

[41] Despite the contradiction between the oral testimony of PW1 and his police report in respect of whether the accused immediately let go of PW4 upon seeing PW1 as stated in his police report or that PW1 had to pull the accused's hand to free PW4 and that he saw the accused had pulled PW4 towards him and kissed her while PW4 was pushing the accused with her hands with her feet at a distance from the accused suggesting that PW4 was trying to free herself from the accused as he said in his oral testimony, the learned magistrate accepted PW1's evidence although the learned magistrate acknowledged that PW1 is an interested witness. In her grounds of judgment, the learned magistrate did not explain why she chose to believe the evidence of PW1 as credible despite being an interested witness.

[42] On the facts of the present appeal, I hold the considered view that there is every likelihood that the PW1 could have embellished his story to bolster the case against the accused. It is reasonable to infer that, upon seeing such an incident before his own eyes, PW1 would want to make sure that the perpetrator pays the price for the act committed by the accused against his daughter, PW4.

[43] In the present appeal, the video recording (exh P6) was made by PW5 for the purposes of investigation and the learned magistrate had made the same finding. The admissibility of a video recording as evidence of a child witness under s 3(1)(c) of the Evidence of Child Witness Act 2007 must be one which

was made 'with a view to its admission as evidence of examination-in-chief of the child witness' as envisaged by s 2 of the Act.

[44] Section 2 of the Evidence of Child Witness Act 2007 defines 'video recording' as follows:

> 2 Interpretation
>
> In this Act, unless the context otherwise requires:
>
> 'video recording', in relation to a child witness, means a video recording of the oral evidence of the child witness, in the form of an interview conducted between a police officer and the child witness, expressed upon any format, *made with a view to its admission as evidence of examination-in-chief of the child witness*. (Emphasis added.)

[45] Section 3 of the Evidence of Child Witness Act 2007 reads:

> 3 How evidence of child witness may be given
>
> (1) A child witness may, at any stage of a trial, give evidence in any one or a combination of the following manner:
>
> (a) by having a screen between him and the accused or a child charged with any offence;
>
> (b) by live link;
>
> (c) by video recording.
>
> (2) For the purposes of this section, any evidence given under subsection (1) shall be deemed to be evidence given in an open court.

[46] In her judgment, the learned magistrate had relied on exhs P6 and P6A, namely the video recording of an interview of the victim ('PW4') which carried out by PW5, as part of the evidence against the appellant. The learned magistrate made a finding that the video recording (exh P6) is admissible as evidence-in-chief of PW4 although it (exh P6) was also used as part of the investigation. However, the learned magistrate did not provide her reasons as to how she finds that the video recording (exh P6) to qualify as evidence-in-chief of PW4 although it was used in investigation despite there being no evidence to clearly suggest that it (the video recording) was done with a view to its admission as evidence of examination-in-chief of PW4.

[47] On the issue of interpretation of statutes and the need for courts to refrain from importing words which are not there in the statute to favour certain particular parties, the Federal Court in the case of *Mary Colete John v South East Asia Insurance Bhd* [2010] 6 MLJ 733; [2010] 8 CLJ 129; [2012] 6 MLRA 89 (FC) made the following remarks:

It justifies the reminder made in *Ulster-Swift Ltd v Taunton Meat Haulage Ltd* [1977] 1 WLR 625 where Megaw LJ said:

> (The danger of such latitude) is not, indeed, that the judges become legislators, but that they may become legislators with widely differing, and perhaps unduly legalistic, views of the policy which is, or ought to be, behind the legislation. Hence the law, whatever it may gain in other respects, may in some cases suffer a loss in what has always been regarded as one of the essential features of law-uniformity; or at least predictability. Sometimes, in relation to the judicial view of 'the presumed purpose of the legislation', it may be a case of *quot judices, tot sententiae*: whereas in relation to what the legislation has actually said, it is unlikely that judicial opinion would vary so widely.

[48] In *Tan Kim Hock Product Centre Sdn Bhd & Anor v Tan Kim Hock Tong Seng Food Industry Sdn Bhd* [2018] 2 MLJ 1; [2018] 2 CLJ 567; [2017] MLRAU 522, the Federal Court also made the following observations with regard to the approach to take in interpreting a particular Act of Parliament:

> [49] Lest we may be misunderstood, it must be reiterated that judges must give effect to the intention of Parliament in enacting legislation and that is better done by filling in the gaps and thus making sense in the legislation. Quoting the words of Donaldson J in *Corocraft Ltd and another v Pan American Airways Inc* [1968] 2 All ER 1059 at p 1071:
>
> > The duty of the courts is to ascertain and give effect to the will of Parliament as expressed in its enactments. In the performance of this duty the judge do not act as computers into which are fed the statue and the rules for the construction of statues and from whom issues forth the mathematically correct answer. The interpretation of statues is a craft as much as a science and the judges, as craftsmen, select and apply the appropriate rules as the tools of their trade. They are not Legislators, but finishers, refiners and polishers of legislation which comes to them in a state requiring varying degrees of further processing.
>
> [50] Reiterating the same, Seah SCJ in *NKM Holdings Sdn Bhd v Pan Malaysia Wood Bhd* [1987] 1 MLJ 39; [1986] 1 LNS 79 at p 40 made the following reminder on the role of judges:
>
> > It must be borne in mind that we are judges not legislators. The constitutional function of the courts is not only to interpret but also to enforce the laws enacted by Parliament. In enforcing the law we must be the first to obey it. It should be noted that the power of a court to proceed in a particular course of administering justice, was one of substance and not merely of form, the duty of the court and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. The court has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. It seems to us to be unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the Legislature (see Lord Chelmsford in *R v Hughes* (1) and Lord Macnagthen in *Vacher & Sons v London Society of Compositors* (2)).

A [51] We are always mindful that it is our bounden duty to apply the laws as passed by Parliament however archaic and unfair it might seem or appear to be. The duty of making or changing the law lies with Parliament and not the courts.

B **[49]** In construing the meaning of the then s 14(2)(b) of the Control of Supplies Act 1961, His Royal Highness the late Raja Azlan Shah LP (as His Royal Highness then was) speaking for the Federal Court in the case of *Public Prosecutor v Chu Beow Hin* [1982] 1 MLJ 135; [1982] CLJ 110; [1982] CLJ Rep 288; [1981] 1 MLRA 181 held the view that courts could not detract from the clear words of a statute and that the clear and explicit words of the statute must be given effect to. His Royal Highness the late Raja Azlan Shah LP (as His Royal Highness then was) said:

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> The first task of the court is to find out the intention of Parliament and the words of a statute speak the intention of Parliament. 'And in so doing it must bear in mind that its function is *jus dicere*, not *jus dare*: the words of a statute must not be overruled by the Judges, but reform of the law must be left in the hands of Parliament' (*Maxwell on Interpretation of Statutes* (12th Ed) pp 1–2).

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E **[50]** His Royal Highness the late Raja Azlan Shah LP (as His Royal Highness then was) continued further and held that:

> If there is one rule of construction for statutes and other documents, it is that you must not imply anything in them which is inconsistent with the words expressly used' (see *In re a Debtor* [1948] 2 All ER 533). In our opinion, what should be a fundamentally simple case has been confused and obscured beyond all proportion.

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> We take the view that the enacting words of s 14(2)(b) are not only very clear, but they are also direct. 'If proceedings are instituted within thirty days of the seizure of goods by any of the officers named in s 14(1) of the Act, the court may, inter alia, *forfeit* or otherwise dispose them in such manner as it may direct. What could be plainer than that? In such a case the court must give effect to the clear and explicit language of the enacting words of the subsection. It cannot disregard them unless it is apparent that some other meaning is intended. Of course, 'it must often be difficult to say that any terms (of a statute) are clear and unambiguous until they have been studied in their context' (see *Attorney-General v HRH Prince Ernest Augustus of Hanover* [1957] 1 All ER 49 at p 55).

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H

[51] In construing the meaning of s 3(1)(c) of the Evidence of Child Witness Act 2007 read together with s 2 of the Act, I hold the considered view that in order to be admissible under s 3(1)(c) of the Evidence of Child Witness Act 2007, the video recording of the oral evidence of the child witness must be made with a view to its admission as evidence of examination-in-chief of the child witness. If the video recording is not made with a view to its admission as evidence of examination-in-chief of the child witness, it is not a 'video recording' as envisaged under s 2 to be admissible under s 3 of the Act. This to my mind is clear from the reading of the Act and there could not be an

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interpretation against the clear provision of the statute.

[52] The video recording of PW4 was taken by PW5 on 20 February 2013 at about 11.46am and trial commenced on 14 November 2013. In cross-examination, PW5 said as follows:

> Soalan: Penugasan yang telah diberikan kepada kamu untuk percakapan video ke atas NA adalah atas arahan pegawai penyiasat kes tersebut.
>
> Jawapan: Rakaman itu dilakukan untuk membantu siasatan pegawai penyiasat tersebut.
>
> Soalan: Keseluruhan proses percakapan video telah diambil pada 20/ 2/2013 untuk membantu pegawai penyiasat. Ia sebahagian daripada penyiasatan yang dijalankan oleh pegawai penyiasat kes.
>
> Jawapan: Ya, betul.

[53] I do not find any part of PW5's examination-in-chief where PW5 said that the video recording was done with a view to its admission as evidence of examination-in-chief of PW4. I also do not find any evidence which tend to show how the prosecution had sought to introduce the video recording (exh P6) as evidence pursuant to s 3(1)(c) of the Evidence of Child Witness Act 2007 except by merely submitting that it is.

[54] In considering the video recording (exh P6) in light of the evidence of PW5 as to the manner it was recorded and against the provisions of ss 2 and 3, I hold the considered view that exh P6 is not admissible because it was not a video recording made with a view to its admission as evidence in examination-in-chief of the child witness pursuant to s 3(1)(c) of the Evidence of Child Witness Act 2007 read together with s 2 of the Act. Had it been the case, it would be easy for the prosecution to lead evidence that the video recording was in fact made for the purposes of examination-in-chief of PW4 but this was not done. There was also no explanation attempted by the prosecution during re-examination of PW5 on this issue although the defence has already established that the video recording was made for the purposes of investigation. It is trite that inadmissible evidence remains inadmissible.

[55] In the absence of the video recording (exh P6) and the transcript (exh P6A), the prosecution is left with the oral evidence of the victim (PW4) taken through a screen pursuant to s 3(1)(a) of the Evidence of Child Witness Act 2007, her parents (PW1 and PW2) and the eyewitness (PW3). The learned magistrate relied on the evidence of PW4's parents and state in her grounds that in doing so, she had cautioned herself when she considered the evidence because they are of interested witnesses. However, the learned magistrate did not elaborate or explain the nature and extent of the caution she took when she cautioned herself when accepting the evidence of PW1 and PW2. Neither did

the learned magistrate elaborate what made her accepted the evidence of PW1 especially, and PW2 as credible despite them being interested witnesses.

[56] In that circumstance, I hold the considered view that this court is left with doubts as to whether the learned magistrate had in fact scrutinised the evidence of PW1 and PW2 with sufficient caution to guard against facts falsely implicating the appellant or even embellishing their story when viewed against the police report (exh P1). Had the learned magistrate applied her mind correctly as to the weight to be attached to such evidence in view of the fact that PW1 and PW2 are interested witnesses? Unfortunately, these reasons are not found in the grounds of the learned magistrate.

[57] I am of the view that this part of the evidence is material and crucial for the determination of the case because it shows whether or not the victim consented to the act being one of the ingredients necessary to constitute the offence under s 354 of the Penal Code. Consent of the victim is the appellant's defence.

[58] In *Mohd Yusri bin Mangsor & Anor v Public Prosecutor and another appeal* [2014] 4 MLJ 875; [2014] 7 CLJ 897; [2014] MLRAU 284 (CA), the Court of Appeal made the following observations in relation to the duty of the appellate court:

> [4] ... We have also scrutinised the records available before us. We are mindful that this is a factual based appeal. It is trite that an appellate court will be slow to interfere with the findings of facts and judicial appreciation of the facts by the trial court to which the law entrusts the primary task of evaluation of the evidence. However, there are exceptions. Where:
>
> (a) the judgment is based upon a wrong premise of fact or of law;
>
> (b) there was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him;
>
> (c) the trial judge has completely overlooked the inherent probabilities of the case;
>
> (d) that the course of events affirmed by the trial judge could not have occurred;
>
> (e) the trial judge had made an unwarranted deduction based on faulty judicial reasoning from admitted or established facts; or
>
> (f) the trial judge had so fundamentally misdirected himself that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion,
>
> then an appellate court will intervene to rectify that error so that injustice is not occasioned, then an appellate court will intervene to rectify that error so that injustice is not occasioned (see *Perembun (M) Sdn Bhd v Conlay Construction Sdn*

Bhd [2012] 4 MLJ 149 (CA); *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395; [1996] 4 CLJ 545 (CA)).

[59] Having considered the evidence adduced and the decision of the learned magistrate, with respect, I am of the view that the learned magistrate had failed to judicially appreciate the evidence placed before her and that this has warrant appellate intervention.

CONCLUSION

[60] Upon evaluating the record of appeal and considering the submissions of both learned counsel and the learned deputy, I am of the considered view that the prosecution failed to establish its case against the appellant beyond a reasonable doubt. I am of the considered view that on the facts of the case, the prosecution has failed to establish that the act was done without the consent of PW4. In other words, I am of the considered view that the element of criminal force, which is an essential ingredient to establish an offence under s 354 of the Penal Code, has not been proved by the prosecution beyond a reasonable doubt.

[61] I am of the considered view that the learned magistrate has failed to carry out a maximum evaluation of the evidence and to consider the defence in totality of the evidence presented by the prosecution. The conviction is not safe. I hereby allow the appeal, quash the conviction and set aside the sentence. The accused is hereby acquitted and discharged.

Appeal allowed, accused acquitted and discharged.

Reported by Afiq Mohammad Noor